

# **Independent Panel of experts report on victim participation at the International Criminal Court**

**July 2013**

**Based on the Panel's meeting and consultations held in The Hague**

**on 24-27 April 2013**

## Acknowledgements

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## I. Executive summary

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1. On 24 to 27 April 2013, a Panel of nine independent experts with extensive experience in processes involving large numbers of victims met in The Hague to consider challenges that the International Criminal Court (ICC) is currently facing in giving effect to the rights of victims to participate in the Court's proceedings. The meeting was organised by Amnesty International and REDRESS, in consultation with the Panel members and the ICC.
2. This report, which is based on the Panel's review of the current participation system and detailed consultations with the ICC and non-governmental organisations (NGOs), sets out its findings, including principles and recommendations aimed at strengthening the participation system and ensuring that participation is effective and meaningful for victims.
3. In the preparation of the report, the Panel has been particularly mindful that participation must be consistent with the rights of the accused, as required by Article 68(3) of the Rome Statute, and that the independence of the Prosecutor and the judiciary must be respected. The Panel has also been conscious of resource constraints that the ICC is facing and has endeavoured to identify recommendations aimed at ensuring that the participation process functions both efficiently and effectively. Nevertheless, it has identified some areas where greater investment is required.
4. The Panel reviewed the legal framework and learned about the ICC's strategies, practice and jurisprudence. It concludes that there is significant potential for the ICC to develop a system which greatly benefits victims. Allowing victims to participate meaningfully in the ICC's proceedings can, independently of any reparation outcomes, empower them and contribute to their healing. The Panel also recognises that participation can strengthen the work of the ICC by establishing a strong connection between the Court and those most directly affected by the crimes it is investigating and prosecuting. Victims can provide important factual and cultural context regarding the crimes and their impact, which can also contribute to establishing the truth, as well as an historical record of events. Effective realisation of victims' rights may also help ensure lasting support for the ICC, act as a deterrent against future violence and inspire more victims and affected communities to demand justice, truth and reparation at the national level.
5. However, the Panel found that, despite significant efforts and investment, the ICC's participation system is currently failing to achieve this potential and there are concerns regarding its sustainability, effectiveness and efficiency, as well as its meaningfulness for victims. The Panel considers that the system has been undermined by the way it has been developed, primarily on a case by case basis. Procedures and processes developed in the first cases involved relatively low numbers of victims and seem unable to handle much larger numbers of victims that are applying in other cases. The system is also significantly affected by divergent visions of the participation system within the ICC. The Panel is concerned that different efforts aimed at addressing the current challenges are disjointed and risk further undermining the system of participation.
6. The Panel considers that overall, the current legal framework provides a sound basis for effective and meaningful participation and that the ICC's strategic objective for participation and

representation, set out in its 2012 Revised Strategy in relation to victims,<sup>1</sup> is achievable. The Panel is strongly of the view that the participation system can be tailored to effectively respond to larger numbers of victims. Creative and effective solutions can also be found to overcome other challenges. However, some changes to the Rules of Procedure and Evidence, Regulations of the Court or the Regulations of the Registry may be required to implement procedural recommendations proposed by the Panel.

7. The Panel emphasises that a shared vision of victim participation should be encouraged within the ICC. It recommends that the participation system should be reviewed under the leadership of the judges with a view to developing consistent Court policies and guidelines in relation to victim participation, while keeping in mind that case-specific approaches may also be required in certain instances. Such a review should also consider the ICC's general approach to modalities of participation across the entire process including investigations, pre-trial, trial, sentencing and reparation and appeals, taking into account the experiences of the first cases.
8. Victims will only participate if they are informed of and understand their rights to participate and seek reparation before the ICC. The Panel considers that outreach efforts can be strengthened to ensure that victims are better informed of their rights. This should include providing general information to victims and affected communities about their rights at the earliest stage possible. The Court should also continue to develop innovative strategies, taking into account lessons learned, and the infrastructure available in each situation, to communicate effectively with communities in remote areas, women, people from marginalised groups and children.
9. The Panel was informed of the different application systems employed by the ICC at present and considers that this has the potential to confuse victims and intermediaries. The Panel considers that the application process should seek to ensure that: victims provide the ICC with sufficient information to make a determination on their status; victims can communicate information to the Court; the ICC has sufficient information to communicate with victims; and victims can provide information to support requests for reparation and to make an initial request to be included in the reparation phase. A full set of applications should also provide the Court with a sense of the universe of victims affected by cases or investigations. Application forms should therefore be short with the possibility for victims to provide additional information and tell their stories, if they wish. The forms should be available in local languages or key words and concepts should be translated.
10. The Panel acknowledges the serious challenges that the ICC is facing in processing increasing numbers of applications in some cases and recommends that creative approaches should be explored to expand the ICC's processing capacity promptly and efficiently and to enable the ICC to scale up to meet peak periods of application submissions, particularly around deadlines. Steps could also be taken to streamline the current multi-layered process, while ensuring that the rights of victims and the accused are respected. The Panel sets out a number of techniques that the ICC may consider, including the enhanced use of databases, further development of the use of the Registry's reports on applications and monitoring the quality of processing through sampling.
11. The Panel was informed of initiatives to group victims for the purpose of application and participation and considered the possible use of group application forms as well as of grouping

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<sup>1</sup> Revised Strategy in relation to victims, ICC-ASP/11/38, 5 November 2012.

individual applications after they are received. While group approaches may provide part of the solution to the increasing number of victims who want to participate in the proceedings, they are not without their challenges. The Panel makes recommendations to ensure that, if group approaches are considered, the individual right of victims to participate, as set out in Article 68(3) of the Rome Statute, is respected and that the voices of all victims, including women, marginalized people and children, are heard.

12. The Panel stresses that the quality of the legal representation victims receive is essential to their meaningful and effective participation in ICC proceedings. In keeping with the Rules of Procedure and Evidence, victims ought to have a direct say in the choice of their counsel. Legal representatives should be experienced in working with victims and vulnerable persons as well as in managing large numbers of clients. Providing legal representation to large groups of victims is a complex process and legal representatives should be provided with guidance on best practices. Information should also be provided to victims on what they should expect from counsel and what avenues are available to them, should they wish to raise concerns regarding their representation.
13. The Panel underlines that legal representatives must be able to consult regularly with their clients to keep them informed of the proceedings and gather their views and concerns to ensure that they are effectively presented to the ICC. Regular in person consultations with legal representatives must be maintained, including during periods of low or no judicial activity.
14. In order for victims to present their views and concerns, they need to be provided with information to understand the wider Court process in a format that is accessible. The Office of the Prosecutor (OTP) is encouraged to undertake systematic and comprehensive efforts to reach out to victims during the preliminary examination phase; expand its dialogue with victims and affected communities prior to deciding upon charges and issuing arrest warrants; explain the choices it has taken once an arrest warrant or summons has been issued; and facilitate victims' understanding of its decisions. Coordinated communication between the various organs and units interacting with victims and legal representatives will assist in ensuring that participating victims are regularly informed of developments in proceedings. Where the security situation allows, *in situ* proceedings should also be considered so that victims can directly witness the justice process, including their representative in the courtroom.
15. The report is being submitted to the ICC and the Trust Fund for Victim (TFV), as well as legal representatives for victims, the Office of Public Counsel for Victims (OPCV) and the Office of Public Counsel for Defence (OPCD) for their consideration. It is also being submitted to The Hague Working Group facilitation on Victims and affected communities, the Trust Fund for Victims, reparations and intermediaries (HWG) and the Assembly of States Parties (ASP), in advance of its discussion on the impact of the Rome Statute system on victims and affected communities at its twelfth session in November 2013.

## II. Introduction

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16. From 24 to 27 April 2013, a Panel of independent experts with extensive experience working in processes involving large numbers of victims met in The Hague to consider challenges that the ICC is currently facing in giving effect to the rights of victims to participate in the Court's proceedings, in accordance with Article 68 (3) of the Rome Statute.

### ***Purpose of the meeting***

17. The primary aim of the meeting was to develop principles and recommendations aimed at strengthening victims' participation before the ICC, including addressing the most immediate challenges and ensuring that participation is effective and meaningful for victims.

### ***The Panel***

18. The Panel includes experts who have worked on mass claims, class actions and other processes involving large numbers of victims. Its members represent a range of disciplines and perspectives, including legal, psycho-social and management/administration. Biographies for the Panellists are contained in Annex 1.

### ***The Secretariat***

19. The Panel was convened by Amnesty International's Centre for International Justice and REDRESS. The organisations planned the meeting in consultation with the Panel and the ICC. Participation of the experts was funded by Amnesty International's Centre for International Justice. Staff of Amnesty International and REDRESS served as the Secretariat for the Panel, providing background information, logistical and other support. In support of the Panel's discussions, the Secretariat identified a series of topics and questions in consultation with the ICC. These are included in Annex 2.

20. In advance of the session, the Panel reviewed a number of documents regarding the ICC's victim participation system and the challenges the ICC currently faces, as well as background papers prepared by the Secretariat. A list of the documents is included in Annex 3.

### ***The Panel's meeting and its consultations***

21. On the morning of 24 April 2013, the Panel held its first meeting to review its work plans. It also met with NGOs to hear their views on the participation system including Avocats Sans Frontières, the Coalition for the ICC, the International Bar Association, Open Society Justice Initiative and Parliamentarians for Global Action. The International Federation for Human Rights submitted views in writing to the Panel.

22. On the afternoon of 24 April and the full day of 25 April, the Panel held detailed consultations with relevant sections and organs of the ICC to discuss their views on the current participation system and the specific challenges they face in implementing the system. The Panel was welcomed to the Court by the recently elected Registrar and the Deputy Registrar, and met with Judge Ekaterina Trendafilova, Judge Joyce Aluoch and Judge Christine Van den Wyngaert; Senior Legal Advisors to the Pre-Trial and Trial Divisions of Chambers; the OTP; the Victims Participation and Reparation Section (VPRS); the Outreach Unit of the Public Information and Documentation Section (PIDS); the Counsel Support Section (CSS); the OPCV; the OPCD; and the TFV. The Panel

also met with some case managers currently assisting legal representatives of victims and subsequently received observations from two of the case managers in writing. The Panel also received a written submission from two teams of legal representatives for victims in the cases of *The Prosecutor v Mathieu Ngudjolo Chui* and *The Prosecutor v. Germain Katanga*.

23. The Panel recognises that it was not able to meet with the most important constituents – victims themselves – which was beyond the scope and resources available for this initiative. Victims will typically have diverse views and expectations of participating before the ICC. It is essential that they are listened to and play a key role in shaping the participation system. The Panel is aware that a project is being prepared by University of California Berkeley to survey victims who have participated in the ICC’s proceedings to obtain their feedback. The outcomes of this and other studies should be considered as part of an on-going review of the participation system.
24. On 26 and 27 April, the Panel met in closed session to discuss each of the topics under consideration in detail, taking into account the input received during its consultations.

### ***The Panel’s report***

25. This report contains the conclusions of the Panel. It sets out general observations and comments on the ICC’s current victim participation system, seven key principles that it recommends the ICC should apply in further developing the participation system and detailed recommendations for informing victims of their rights to participate; ensuring victims can apply to participate; processing applications; assigning legal representation; consulting victims and taking instructions; and keeping victims informed of the proceedings. Key recommendations are highlighted at the beginning of each section.
26. The content of the report is based on the discussions that took place between the experts, as well as information provided to the Panel during its consultations and background documents it reviewed. A draft of the report was also provided to the ICC and NGOs for comments between 29 May and 14 June. Comments were received from the Presidency and Chambers, the OTP, the Registry and Avocats sans Frontières which have been considered by the Panel in finalising the report.
27. During its consultations, the Panel heard different views about the way in which the ICC should give effect to the right of victims to participate set out in the Rome Statute. While considering all views, the Panel has focussed on finding the most effective way to ensure that victims can participate meaningfully in proceedings on the basis of the Rome Statute system. In particular, the Panel has been mindful of the requirement that participation must be consistent with the rights of the accused and that the independence of the Prosecutor and the judiciary must be respected.
28. The Panel focussed specifically on what it sees as the most pressing challenges the ICC is facing, in particular relating to the growing numbers of victims seeking to participate before the ICC. However, the report also includes observations and recommendations on other aspects of the participation process and in some cases identifies areas where further policy and strategy development is required, recognising the existing jurisprudence of the Court in relation to victims’ participation.
29. The Panel has also been conscious of resource constraints that the ICC is facing and has endeavoured to identify recommendations aimed at ensuring that the participation process



functions both efficiently and effectively. Nevertheless, it has identified some areas where greater investment is required.

30. The content, including the principles and recommendations, represent the views of the Panel and not of its Secretariat. Amnesty International and REDRESS may, however, take a position in the future on the Panel's recommendations.
31. The report is being submitted to all organs of the ICC and the TFV, as well as legal representatives, OPCV and OPCD for their consideration. It will also be presented to The HWG which is considering, among other relevant issues, amendments to the legal framework for the implementation of a predominantly collective approach in the system for victims to apply to participate in the proceedings. Furthermore, it will be presented to the ASP, which will consider the impact of the Rome Statute system on victims and affected communities at its twelfth session in November 2013.

### **III. General observations**

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#### ***The importance of participation and its potential contribution to the Rome Statute system***

32. The Panel recognises the importance of victim participation before the ICC. In the experience of its members, legal processes that are accessible to victims, properly explained and predictable, acknowledge the harm they suffer, treat them equally and with dignity, allow them a voice and listen to their views and concerns at appropriate stages where their interests are affected can in themselves – independently of any reparation outcomes – empower victims and contribute to their healing.
33. Victim participation can also contribute to the ICC’s proceedings by establishing a strong connection between the Court and those most directly affected by the crimes it is investigating and prosecuting. When proceedings take place in The Hague, participation can help close the gap between victims and the ICC. Victims can provide important factual and cultural context to the proceedings regarding the crimes and their impact. This can also contribute to the establishment of the truth. Where appropriate, their views and concerns can inform decisions taken by the ICC.
34. Furthermore, victim participation has the potential to contribute to the broader goals of the Rome Statute system. The rights of victims in the Rome Statute have been a central factor in motivating civil society around the world to campaign for ratification contributing to universality. The realisation of these rights will ensure lasting support for the ICC and can act as a deterrent against future violence. By empowering victims in situations where impunity exists to engage in the judicial process, participation also has the potential to inspire more victims and affected communities to demand justice, truth and reparation at the national level which can contribute to complementarity efforts. Victims and affected communities who can access justice effectively and invoke the rule of law will have greater protection against further human rights violations.
35. Finally, the Panel considers that participation could play a positive role in establishing an historical record of what happened. Victims’ views and concerns presented to the ICC could contribute to current or future initiatives to document the crimes and their impact, subject to any appropriate protection measures. This can contribute to social recognition of suffering and support efforts to guarantee non-repetition of crimes under the jurisdiction of the ICC.

#### ***Challenges arising from the current ICC participation system***

36. The Panel notes that, regrettably, the ICC’s participation system is currently failing to achieve this potential. Despite significant efforts and investment, the ASP and others have questioned the sustainability, effectiveness and efficiency of the system, as well as its meaningfulness for victims.
37. Significant problems have arisen in administering applications for participation. The system is struggling to meet growing numbers of victims seeking to participate. This has led to delays in processing application forms and victims being excluded from some stages of proceedings. There are numerous initiatives by different Chambers, the Registry and the ASP to revise the application system to address this issue. However, these initiatives are disjointed and driven by different visions of participation. Indeed, some expressed concern that recent increases in

applications highlight problems in the system and did not appear to consider them to be an indicator of success. Rather than addressing the challenge, there is a real risk that the divergent practices will weaken the system, frustrate and confuse victims and undermine other ICC functions, including outreach informing victims how to apply.

38. The Panel found that more needs to be done to inform victims about their right to participate and seek reparation before the ICC. Despite the increasing numbers of applications in some cases, it is likely that many other victims still lack sufficient information to access the ICC.
39. Genuine concerns also exist that participation is currently not meaningful for victims who are accepted to participate. It appears that, in many instances, victims are not able to access sufficient information regarding the proceedings and to present their views and concerns at appropriate stages. The role of legal representatives, including the resources and the support they receive, is particularly unclear.
40. The Panel heard conflicting views on the impact on proceedings of the additional tasks and procedures required to enable victims to participate. Some expressed concern that participation, in particular the application process, creates additional work for the judiciary and extends proceedings. However, others indicated that tasks and procedures implementing the rights set out in the Rome Statute should not be viewed as a burden and were of the opinion that participation did not impact significantly on Chambers' work or infringe on the rights of the accused to be tried without undue delay.

### ***Strengthening the system***

41. In reviewing the participation system, the Panel has considered the legal framework, the ICC's strategic, policy and operational approach to victim participation, as well as the evolving jurisprudence.
42. The Panel does not believe that the legal framework is an underlying cause of the problems. On the contrary, the Panel considers that, overall, the framework provides a sound basis for effective and meaningful participation and that its underlying goals are achievable. However, some changes to the Rules of Procedure and Evidence, Regulations of the Court or Regulations of the Registry may be required to implement procedural recommendations proposed by the Panel.
43. The Panel also considers that the ICC's strategic objective 3 on participation and representation set out in the Court's Revised Strategy in relation to victims is a good guide for its work. It states:

“Ensure that victims are able to fully exercise their right to effectively participate in the ICC proceedings with effective legal representation in a manner that is consistent with their rights and personal interests as well as with the rights of the accused to a fair, expeditious and impartial trial.”<sup>2</sup>
44. In the Panel's view, most problems arise from the way the participation system has been developed and operationalised. In the absence of a shared vision of victim participation, the system has developed through decisions of different Chambers in response to the circumstances of each particular case, including relatively small numbers of victims in the first cases.

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<sup>2</sup> *Ibid.*, para. 20.

45. The Panel believes that the system can be tailored to larger numbers of victims seeking to apply in more recent cases. Creative and effective solutions can be found to overcome other challenges. The principles and recommendations set out in the following sections seek to identify ways to implement the current system without the need for significant changes to the legal framework and without having to scale back on victims' rights. They draw significantly from the vast experience and techniques used in other comparable processes.
46. However, the underlying problem of diverse visions of victims' participation within the ICC also needs to be addressed. The Panel believes this is an issue primarily for the judges who ultimately decide the way victims participate in proceedings. While the practice and the jurisprudence of the ICC are evolving, the ICC should be in a position to inform victims with some certainty about what participation entails so that they can decide whether they want to engage with the Court. Recognising that judges remain independent in their decisions and that the number and situation of victims in different situations may require case-specific approaches, the Panel suggests that the judiciary should review the participation systems with a view to developing consistent Court policies and guidelines in relation to victim participation. In the absence of such policies and guidelines, the Panel recommends that these issues be discussed as early as possible in the proceedings and decisions communicated to victims promptly.
47. The Panel also considers that the participation system can be strengthened by recognising the important link between participation and reparation. While recalling that individual victims will have different motivations and interests in engaging with the ICC, the Panel observes that many victims seeking to participate in the process may also want to apply for reparation and it is therefore important that they understand the ICC's approach to reparation and how it relates to participation. The development of principles on reparation in accordance with Article 75 could assist victims in deciding whether they want to engage with the Court and what they might expect from potential reparation proceedings that may take place at the end of a trial.

#### ***Reviewing modalities of participation***

48. The Panel also encourages the judiciary to consider, as part of this review, the ICC's approach to modalities of participation across the entire process including investigations, pre-trial, trial, sentencing and reparation and appeals, taking into account the experiences of the first cases. Although the Panel acknowledges that victims have been granted broad participatory rights in the first trials and reparation proceedings, their ability to participate in the early stages of the proceedings has been limited, in particular during investigations. Victims have also not been able to appeal decisions that affect their interests.
49. The Panel observes that victims can file submissions at the early stage of the proceedings when the Prosecutor decides to open an investigation *proprio motu*. In other instances, Chambers have decided that victims should not have access to many of the filings at this stage or be allowed to present views and concerns which seek to influence the scope of the investigation, including who will be prosecuted or the charges. While the Panel acknowledges the Prosecutor's independence, it heard mixed views on whether it should serve as a reason to preclude victims from presenting their views and concerns about the scope and direction of the OTP's investigations. Indeed, the Panel does not see a direct conflict in victims having access to information regarding the investigation or for victims to put their views and concerns formally on the record of the situation/case. It notes that the Prosecution's decisions on charging in all

circumstances have a direct impact on victims, as only victims of the crimes charged will be able to continuing participating in the proceedings and a link to the charges may be required for the purpose of obtaining reparation. As such, the Panel observes that the charging stage may be considered by some victims as the most fundamental stage, as it defines which crimes or incidents – including what might be hidden crimes such as sexual violence - will ultimately form part of the case, and thus, part of the historical record for that situation.

50. Under the Rome Statute, a right to appeal for victims participating in proceedings is only referred to in Article 81(4) and related Rules which provides that victims can directly appeal orders for reparation. The Panel heard mixed views on whether this precludes victims from appealing other decisions. It was informed that, in practice, victims have only been able to present their views and concerns in interlocutory appeals initiated by one of the parties. In the Panel's view, meaningful participation requires that victims be able to appeal decisions which directly impact them, unless a determination is made that it would be inappropriate or inconsistent with the rights of the accused.

## IV. Principles

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51. The Panel recommends that the following principles should be applied in further developing the ICC's victims' participation system:
52. **Principle 1:** Victims have a right to participate in proceedings before the ICC, in accordance with the Rome Statute. The exercise of this right should be substantive in principle and practice, without prejudice to the rights of the accused and a fair and impartial trial.
53. **Principle 2:** Victims should be treated with compassion and respect for their dignity. Policies and decisions relating to participation shall ensure non-discrimination on the basis of sex, gender, gender identity, marital status, sexual orientation, age, ethnicity, race, political affiliation, class, nationality, religion, disability or any other status.
54. **Principle 3:** To give full effect to the right of victims to participate, victims must be familiar with the ICC and should know and understand fully the scope of their right to participate, including any constraints or limitations on the exercise of this right. Special efforts should be made to provide information to women, people from marginalised groups, children and communities in remote areas who often have the least access to information about their rights.
55. **Principle 4:** The process by which victims may apply to participate should be accessible, predictable and consistently applied to ensure equal treatment of all victims under the Court's jurisdiction. The process should offer victims an opportunity to share their experiences in a manner that is meaningful to them.
56. **Principle 5:** Victims should be informed regularly of the status of proceedings in a timely and efficient manner, without discrimination.
57. **Principle 6:** The right of victims to participate in ICC proceedings entails the right to proper legal representation of their choice. Legal representatives should consult regularly with their clients about the proceedings and take their instructions with respect to relevant legal issues of interest to them.
58. **Principle 7:** Victim protection is a critical component of the Court's work, including in relation to participation. Appropriate measures should be undertaken to ensure victims' safety, physical and psychological well-being, dignity and privacy, including special care taken to avoid re-traumatisation in the course of legal and administrative procedures associated with their participation in proceedings before the ICC. Specific measures should be in place to respond to special protection needs of women, people from marginalised groups and children.

## V. Informing victims of their rights to participate

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### Key recommendations:

- Inform victims and affected communities generally about the ICC, its proceedings and the rights of victims before the ICC as early as possible in the ICC's work in a situation, including during preliminary examinations;
- Develop standard outreach messages and materials on participation, adapted to different media, to inform victims about what participation involves, the participation process and what they can expect;
- Develop innovative outreach strategies for reaching communities in remote areas, women and girls, and people from marginalised groups, taking into account lessons learned and the infrastructure available in each situation;
- Develop strategies and materials to reach out to children, including in relation to participation.

59. The Panel agrees with the statement in the 2009 Report of the Court on the strategy in relation to victims that, “[i]f the rights of victims are to be effective, victims must first be aware of their right to participate so that they can take informed decisions about whether and how to exercise it...”<sup>3</sup> The Panel believes that the objective on communication in the 2012 Revised Strategy in relation to victims sets out a good basis to achieve this. It states that the ICC will:

“Ensure that victims of situations under preliminary examination or victims of a situation or case under investigation, trial, appeal or for which reparations are being adjudicated receive clear communications about the ICC, its mandate and activities as well as their rights as victims in relation to the elements of the ICC system and at all steps of the judicial process.”<sup>4</sup>

60. While the process of actively seeking applications for participation should be commenced at appropriate stages when the necessary mechanisms are in place to assist victims (see paragraph 73 below), the Panel emphasises that victims and affected communities should be informed generally about the ICC, its proceedings and the rights of victims before the ICC as early as possible in the ICC's work in a situation, even if there are no proceedings taking place. Early outreach should include a general description of what participation before the Court involves, the participation process and what victims who apply to participate can expect. Providing accurate information at an early stage will build knowledge and trust in the ICC, which is essential for victims to engage, and manage expectations. It is also essential to prevent frustration if progress in a situation or case is slow.

61. The Panel considers that, at this time, the ICC's ability to conduct such outreach is being frustrated by three factors.

- i. Despite the ICC's commitment in its 2012 Revised Strategy in relation to victims to communicate with victims at all stages, outreach is not conducted during the preliminary examination phase or at early stages of an investigation. Limited communication with victims at the preliminary examination phase is instead led by the OTP which is “proactive as it sees

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<sup>3</sup> Report of the Court on the strategy in relation to victims, ICC-ASP/8/45, para. 46.

<sup>4</sup> Revised strategy in relation to victims, *supra* n.1, para. 18.

fit”<sup>5</sup>. Limited communication between OTP and victims in most preliminary examinations to date and the absence of outreach – even though there may be no proceedings during the preliminary examination phase - creates a space for rumours and misinformation to take hold and impedes victims from communicating with the ICC. This may limit OTP’s understanding of victims and the crimes they have experienced, lead to victims developing false expectations of the ICC or misleading and negative information deterring victims from engaging with the Court. It can be very difficult to reverse misconceptions or rectify damage once certain ideas take hold.

- ii. Secondly, as recognised during the 2010 Review Conference, where outreach is being conducted, the ICC faces challenges in reaching all victims, in particular women, children and communities in remote areas.<sup>6</sup> The ICC sets out the strategies to reach remote and hard to reach locations in the report accompanying its 2012 Revised Strategy,<sup>7</sup> but has yet to develop detailed processes to be applied in all situations and cases for reaching women, people from marginalised groups and children.
  - iii. Thirdly, the Panel considers that the diverse approaches to victim participation developed and implemented by different Chambers, as well as other ongoing reform efforts, could complicate efforts to conduct informed and accurate outreach. As a result, the Outreach Unit and VPRS are only able to inform victims with any certainty about the process and what victims can expect once the respective Chamber has set out its approach, which often occurs after local actors have already started to engage with victims, and can lead to confusion
62. The Panel was informed that the ICC is currently reviewing its 2006 Strategic Plan for Outreach, which may include consideration of some of these issues. In reviewing its strategy, the Panel recommends that the ICC commit to:
- i. Establish outreach strategies to inform victims and affected communities about the ICC, its proceedings and the rights of victims before the ICC as early as possible in the Court’s work in a situation. This should include explaining during the preliminary examination phase the rights of victims to participate in situations and cases, if the OTP decides to open an investigation, and the OTP making a systematic and comprehensive effort to communicate with victims.
  - ii. Develop standard outreach messages and materials on participation, adapted to different media, to be agreed by all organs of the ICC, which inform victims about what participation involves, the participation process and what they can expect.
  - iii. Review its strategies for reaching remote communities taking into account lessons learned, and the infrastructure available in each situation. The possibility of the ICC purchasing a short-wave radio frequency to broadcast outreach and other information to remote communities should be explored as one additional option.
  - iv. Develop additional innovative strategies and policies to reach out more effectively to women and girls, as well as members of marginalised groups in affected communities.
  - v. Develop special strategies and materials to reach out to children.

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<sup>5</sup> Revised strategy in relation to victims, *supra* n.1, footnote 15.

<sup>6</sup> Official Records, Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May-11 June 2010, RC/11, 21 December 2010, Annex V(a), para. 14.

<sup>7</sup> [Report of the Court on the Revised strategy in relation to victims: Past, present and future, ICC-ASP/11/40, para. 17.](#)



## VI. Ensuring victims can apply to participate

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### **Key recommendations:**

#### *Aim of application process:*

- Ensure the application process seeks to: 1) Provide the ICC with sufficient information to make a determination on their status as a victim eligible to present views and concerns to the Court at appropriate stages of the proceedings; 2) Allow victims to communicate with the Court; 3) Gather sufficient information for the ICC to communicate with victims; 4) Provide the Court with a sense of the universe of victims affected by cases or investigations and 5) Allow victims to provide information to support requests for reparation and to make an initial request to be included in the reparation phase.

#### *Format, content and language of the application form:*

- Use a short application form, available in local languages, which also allows victims to provide any information they feel relevant to their application including possible protection concerns, information about their choice of legal representation and telling the story of what happened to them in their own words;
- Ensure specific attention is paid in designing the forms and training intermediaries to elicit information on sexual and gender-based violence;
- Test new forms prior to them being distributed and further explore the use of new technologies.

#### *Gathering applications:*

- Ensure the process of gathering applications is organised and transparent and intermediaries are sufficiently trained in assisting victims, completing the forms and ensuring the security of information;
- Explore new technologies used in other processes to facilitate completing forms, storing and transmitting information, subject to security of the information.
- Ensure sufficient measures are taken to prevent further traumatising of victims through the application process.

#### *Timing of the application process:*

- Incorporate efforts to solicit and receive applications into the ICC's strategies from the very beginning of a situation, ensuring that, by the time the ICC actively seeks applications: victims have been informed as to what participation involves; they have received information regarding the application process, including how to apply, assistance available and any deadlines set by the Chamber; and intermediaries have been trained in reaching out to victims and assisting them in completing the application form.

#### *Deadlines:*

- Consider allocating two deadlines: one for applications to be submitted to the Registry, followed by another for transmission to the Chamber to allow sufficient processing time;
- Ensure the Court and intermediaries have sufficient time to ensure that all victims are provided with the opportunity to apply and that they are supplied with effective assistance to complete the forms accurately.

#### *Group application forms and grouping individual forms:*

- Ensure that where victims apply to participate as a group, their individual right to participate and present their views and concerns is not negated, through requiring personal information of each individual composing the group and by allowing each member of the group to attach personal statements to the form;

- Refrain from adopting an approach which would only seek group applications;
- Establish guidelines incorporating best and comparative practices for identifying and assisting victims to complete group forms and provide training to ICC staff, intermediaries and legal representatives;
- Where the Registry is tasked to review applications in order to identify groups or classes of victims among individual applicants for the purpose of transmission to the relevant Chamber, it should provide a cover report for each group summarising the situation of the group to the Judges and parties;
- Ensure victims are not further marginalised through collective or group processes, including through training of intermediaries, ICC staff and legal representatives;
- Consider the possibility of recognising sub-groups of victims within groups.

63. In order for victims to exercise their right to participate before the ICC, they must be able to access the process safely. The Court's Rules of Procedure and Evidence establish an application process whereby victims must apply in writing to present their views and concerns in proceedings. Verifying victims' status through applications is appropriate given that victims will present their views and concerns in criminal proceedings. However, the Panel has identified a number of aspects of the current system that pose undue barriers for victims who wish to apply:

- i. The application forms are often long, complex and only available in French and English.
- ii. The ICC has identified in its 2012 Revised Strategy relating to victims that intermediaries, who provide assistance to victims in completing forms, require further training on the forms or in security-related aspects of the process. Although there is a commitment to address this in the report accompanying the 2012 Revised Strategy and draft Guidelines governing relations between the Court and Intermediaries, additional resources to carry out such trainings have yet to be confirmed.
- iii. Mechanisms for checking applications in the field before submission to the VPRS in The Hague appear inadequate. The Panel understands that large numbers of incomplete forms are being sent to the ICC, resulting in delays in processing applications and, in some instances, victims' forms not being transmitted to Chambers. To complete the forms, VPRS must revert to intermediaries and victims for missing information, which is resource intensive and time consuming. It also exposes victims and intermediaries to further contact with the ICC, which in some circumstances could pose security risks.
- iv. Deadlines set by Chambers for applications in certain proceedings have been, in some cases, too short or have not accounted for the time needed for the Registry to process these applications once received.
- v. Uncertainty exists about which application process will be used. For example, different Chambers have taken different approaches to the format and content of application forms. One Chamber also ruled that applications are not required in order to participate in the trial, unless victims wish to present their views and concerns individually by appearing directly before the Chamber, or via video-link.

***Aim of the application process***

64. Before considering how to most effectively address these barriers, the Panel is of the view that the aim of the application process should be established, as this will guide what information is

required, for what purpose and how it is best obtained. The Panel recommends that the application process should seek to:

- i. *Provide the ICC with sufficient information to make a determination on the status of the applicant as a victim eligible to present views and concerns to the Court at appropriate stages of the proceedings.* The ICC has established different tests for victims to participate at different stages of the proceedings, including situation, pre-trial and trial stages. The forms should request sufficient information so that decisions on victims' participation at different stages can be made without the need for victims to complete new forms.
- ii. *Allow victims to communicate with the Court.* The application to participate is, in many cases, the first opportunity for victims to communicate with the ICC. It may also be the first time any authority has shown an interest in their situation and the first time victims speak about their experience. Completing an application form can be an important moment for many victims and may define their relationship with the ICC. Many victims may want an opportunity to tell their stories and should be allowed to do so. Victims may also want to raise protection concerns or views about legal representation at that stage. It is the Panel's view that this information should not be considered superfluous. It will be particularly useful to legal representatives of victims to understand their clients and their needs. This information could be used (subject to adequate protection measures, including redactions) in other initiatives to establish a historic record of the crimes.
- iii. *Gather sufficient information for the ICC to communicate with victims.* The ICC must have sufficient information to be able to notify victims of a decision on their applications and to maintain communication with victims, if they are accepted to participate.
- iv. *Provide the Court with a sense of the universe of victims affected by cases or investigations.* Collectively, the full set of application forms submitted to the ICC should provide the Court with important information about the scope of the crimes, the numbers of victims affected by them and the impact of the crimes on them.
- v. *Allow victims to provide information to support requests for reparation and to make an initial request to be included in the reparation phase.* Although reparation is considered at a later stage, victims should be provided with clear information about the relationship between participation and reparation including that participation in the proceedings is not a pre-requisite to be awarded reparation before the ICC, the potential length of proceedings and the ICC's approach to reparation so that they understand the process and what they can expect of it. They should also be able to request reparation at the time of applying to participate if they wish and to provide the information required in Rule 94 of the Rules of Procedure and Evidence, indicating the injury, loss and harm they have suffered and what remedies they seek. This will remove the need for them to apply separately for reparation later, but should not obviate the need to go back to the victims at the end of the process to get updated information and instructions for the reparation stage.

#### ***Format, content and language of the application form***

65. The Panel notes that two different standard application forms have been developed to date. The first application form for participation issued in 2005 was 17 pages long and a revised seven-page form covering both participation and reparation applications was issued in 2010. The Panel

was informed that a shorter form of only one page was being considered. This was confirmed on 28 May 2013, when the Single Judge in the case of *The Prosecutor v. Bosco Ntaganda* decided, for the purposes of this case, to use a simplified one-page individual application form ‘containing only such information which is strictly required by law for the Chamber to determine whether an applicant satisfies the requirements set forth in Rule 85 of the Rules’.

66. It is the Panel’s opinion that a short form is preferable. It can be completed without a significant burden on victims and make the process of assisting victims easier for intermediaries. Furthermore, a shorter form will require less processing time and resources by VPRS. However, the application form should also provide an opportunity for victims to provide any information they feel relevant to their application including short narrative responses to satisfy the key requirements of Rule 85, possible protection concerns, information about their choice of legal representation and telling the story of what happened to them in their own words, if they so wish. In light of the above recommendations regarding the aim of the applications process, the Panel recommends that a short form should be developed which contains space for victims to provide additional information and/or allows for such information to be attached. Such information may provide victims’ legal representatives with important information about their clients and facilitate their representation. The forms may be tailored to specific situations or cases and the use of standardised answers could be further explored, where possible. In such cases, care should be taken in designing standardised answers to ensure that the forms do not pre-judge any issues that may be determined by the Chamber or preclude victims that wish to apply from doing so.
67. Specific attention may need to be paid in designing the forms and training intermediaries to elicit information on sexual and gender-based violence recognising that stigma, for example, may mean victims are reluctant to state that such crimes occurred. Such information may not always be best captured through standardised answers. Specific language describing such violence drawing from the local culture may need to be considered. A setting appropriate to discussing crimes and their impact on victims and adequate interaction, with sufficient levels of trust and mutual understanding between intermediaries and victims, will also be required.
68. Systems should be developed to test any new forms prior to them being distributed in order to ensure that potential issues, misunderstanding and challenges are addressed.
69. Application forms are available currently in English and French only. This raises obstacles for victims who do not speak either language as well as challenges for intermediaries who are required to translate the questions on the form for victims, and then transcribe their answers back into English or French. Some technical words and expressions used in the forms may not be possible to translate precisely into local languages and may lead to misinterpretation with regard to their true meaning. For example in some languages the term used to translate ‘reparation’ only carries the meaning of ‘compensation’. Application forms should, therefore, be available in local languages. Short forms recommended above would make this more feasible. If this is not possible, key phrases and words should be translated or explained in local languages on the forms to ensure that they are appropriately understood by victims and those assisting them.

### ***Gathering applications***

70. The process of gathering applications should be organised and transparent. Intermediaries should be adequately trained in assisting victims, completing the forms and ensuring the security of information. Safeguards, including effective monitoring and supervision of intermediaries, should ensure that victims are provided with effective support by intermediaries and that intermediaries do not act as gatekeepers to the ICC.
71. The Court should explore new technologies used in other processes to facilitate completing forms, storing and transmitting information, subject to security of the information. For example, recording some information directly in electronic format may facilitate the later processing of applications. Such techniques could also ensure that applications are checked for completion on the ground with appropriate flags and reminders appearing when information is missing to avoid the need to go back to applicants for further information before their applications may be processed.
72. Measures should also be taken to prevent further traumatising of victims through the application process. Appropriate mechanisms must be in place at the application stage to address such risk, through ensuring that specific training is provided to intermediaries and ICC staff assisting victims. The benefits and limitations of applying should be clear from the start to allow victims to take an informed decision on whether to apply.

### ***Timing of the application process***

73. Although victims can apply at any time in cases where no deadline has been set and should not be prevented from doing so, the Panel recommends that efforts to solicit and receive applications should be incorporated into the ICC's strategies from the very beginning of a situation ensuring that by the time the ICC actively seeks applications:
  - i. Outreach has been provided to victims and affected communities at the earliest stages of the process in relation to what participation involves, the participation process and what victims can expect from it. This will enable victims to make informed decisions and manage their expectations (see section V above);
  - ii. Outreach strategies have been developed and are ready to be implemented to inform victims about the concrete application process, including: how to apply; assistance available; any deadlines set by the Chamber. The different stages of the proceedings and how this might affect participation status should also be explained. For example, victims should be informed that they may be able to participate in specific proceedings of a situation but this may not mean that they will be able to participate in a case, depending on the charges;
  - iii. The ICC is able to provide victims who decide to apply with more detailed information about the decision-making process, including clear information on how their applications will be processed, criteria that will be applied in considering the applications, approximate timelines and how victims will be informed of decisions on their applications; and
  - iv. Intermediaries have been trained in reaching out to victims and assisting them in completing the application form. Effective systems should also be in place to monitor and supervise intermediaries' work to ensure the maximum effectiveness and efficiency of their work and to contribute to greater accuracy in completing forms.

## **Deadlines**

74. The Panel notes that Chambers have adopted different approaches in setting deadlines for applications. In some instances where deadlines have been set, the amount of time required for the Registry to process the forms has not been taken into account. As a result, forms received at the last minute in some proceedings have not been processed and victims' applications for participation have not been ruled upon. To address this, Chambers may consider allocating two deadlines, in consultation with the Registry: one for applications to be submitted to the Registry, followed by another allowing sufficient time to process them. Alternatively, the Chamber should instruct the Registry to set a fair deadline for submission of applications, subject to the Chamber's oversight.
75. The Panel considered the length of timelines for applications and concluded that, providing all the measures recommended in paragraph 73 above have been taken, the minimum reasonable time to allow victims to apply should be no less than two to three months from the announcement of the deadline. VPRS and intermediaries will need sufficient time to ensure, in the specific circumstances of each situation/case, that all victims are provided with the opportunity to apply and to supply them with effective assistance to complete forms accurately. In particular, some victims will not be psychologically ready to complete an application when they first meet with the Court or intermediaries, and additional time may be required to build sufficient trust. Extenuating circumstances may require a Chamber to reconsider deadlines. For example, a change in the security situation may prevent outreach and intermediaries from assisting victims with forms, some communities may be informed about the application process too late or the charges in the case may be modified.

## **Group application forms and grouping of individual forms**

76. The Panel notes that one option being considered to address the increasing numbers of victims applying to participate is to adopt a collective approach to applications. Group applications have already been partly implemented in the case of the *The Prosecutor v. Laurent Gbagbo*. The Panel recognises that, in principle, group applications may be a useful tool that can allow Chambers, legal representatives and others to see more clearly the different 'classes' of victims participating.
77. The Panel however emphasises that Article 68(3) provides for victims' individual right to participate in proceedings. While victims may decide to apply as a group or to exercise this right collectively, such a decision should not negate their individual right to participate and to present their views and concerns when their 'personal' interests are affected. Group forms should therefore require the personal information of each individual victim composing the group and allow each member of the group to attach individual statements and other information to the form.
78. The Panel also cautions against adopting an approach which would only seek group applications. Victims do not form homogeneous groups and will not always have shared views, objectives and interests. Forcing victims to organise themselves as a group for the purpose of completing a form could undermine the active participation of many members of the group, particularly, women, people from marginalised groups and children.

79. Where group applications are considered, it will be essential to consider grouping early in the process. Sufficient information must be collected on the possible groups of victims that may be formed or already exist, followed by a clear process for the formalisation of the groups and verification of victims' wish to be part of a group application. Trust within the group will be essential.
80. Guidelines incorporating best and comparative practices should be established by the ICC and training provided to ICC staff, intermediaries and legal representatives with regards to identifying and assisting victims to complete group forms.
81. Grouping of applicants may also be conducted after individual applications have been received, for processing purposes. The Registry could be tasked with identifying groups/classes of victims among the applicants and group applications for the purpose of transmission to the relevant Chamber. Such an approach was adopted by the Single Judge in the *case of The Prosecutor v. Bosco Ntaganda*. The Panel recommends that, when this approach is adopted, the Registry also provides a cover report for each group summarising the situation of the group to the Judges and parties.
82. Collective or group processes should ensure that the most marginalised victims are not further marginalised. Training of intermediaries, ICC staff and legal representatives will be essential in this regard.
83. Sub-groups of victims within groups should also be recognized. While it may be appropriate to group victims of a similar incident in one group, there should be room for the range of victimisation suffered to be adequately reflected (such as groups having suffered specific harm). Sub groups may also be necessary to better represent certain classes of victims, as well as to support them to come forward and talk about their experiences. Sub-groups could include victims of sexual and gender-based violence.

## VII. Processing applications

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### Key recommendations:

- Establish a roster of pre-vetted professionals which can be recruited at short notice to assist with the collection and processing of applications;
- Ensure adequate field presence so that VPRS staff are able to train and monitor the work of intermediaries, as well as interact with victims, when necessary;
- Consider developing a single, centralised database with appropriate protection and security protocols to replace the current system whereby each organ/unit has its own database to process and keep data relating to victims;
- Explore ways to increase coordination between Chambers and Registry during the process of reviewing applications;
- Give consideration to a database review of applications by Chambers following checks by the Registry regarding the overall credibility of applications and proof of identity;
- Explore methods to streamline the current application review process, with effective safeguards to ensure the rights of the accused and judicial oversight, including, for example, basing decisions on the Registry's report on applications or using sampling techniques.

84. Once application forms are received by the Registry, a multi-layered process is initiated whereby VPRS assesses whether applications are complete, seeks missing information as necessary, redacts the application and drafts a report on the applications for the Chamber. The forms are then sent to the parties to the proceedings who review the forms and submit observations to the Chamber. The Chamber also reviews the forms and observations before deciding whether applicants can participate.

85. Despite hearing mixed views on whether the current application process is sustainable with increasing numbers of applications and recognising that there is value in Chambers and the parties reviewing all applications, the Panel recommends that, given the large number of victims' applications expected in some cases, the ICC should explore ways to streamline the process whilst ensuring effective oversight. Additional capacity will still, however, be required by the VPRS.

### **Capacity of VPRS**

86. The Panel heard that, on a number of occasions, VPRS has been unable to process applications to meet deadlines and the commencement of proceedings. While a number of the Panel's recommendations aim to support VPRS's efforts to enhance efficiency – particularly if safeguards are put in place to reduce the number of incomplete forms – the Panel notes that VPRS has limited staff capacity and will struggle to meet fluctuating demands and workload against short deadlines, unless effective systems to scale up its resources during peak periods are in place. The Panel therefore recommends that the Court create a roster of pre-vetted professionals which can be recruited at short notice to assist with the collection and processing of applications. It notes that similar strategies, sometimes referred to as 'surge capacity', are used by UN agencies to respond to refugee and other crises. Mindful of the resource constraints imposed on the Court, States could consider encouraging their civil servants with the appropriate qualifications



and expertise to apply to be included in such a roster. When such candidates are selected by the Court, States could envisage seconding them for specified periods of time.

87. Adequate field presence is also required so that VPRS staff are able to train and monitor the work of intermediaries, as well as interacting with victims when necessary.

#### ***Data repository and access***

88. The Panel emphasises that a good database is essential to ensure the efficient processing and tracking of larger numbers of victim applications. The ICC should consider developing a single, centralised database to replace the current system whereby each organ/unit has its own database to process and keep data relating to victims (from tailored databases to the use of excel spread sheets). Protection and security protocols would need to be designed to ensure each organ/unit only has access to the part of the information it is entitled to, while ensuring that those involved in the review of applications are able to use the database and obtain reports according to set criteria. Such a database could contain:

- i. A core set of information which would be made available to those who require it and are authorised to access it (with redaction automatically applied as appropriate);
- ii. Additional information that specific units/counsel would be able to record, only available to them.

#### ***Review of applications, use of a common database and sampling***

89. The Panel notes that at the early stages of proceedings, it is not clear how Chambers will interpret certain provisions with regard to the temporal and geographical scope of the charges, as well as the crimes involved. The Panel recommends that coordination be increased between Chambers and the Registry during the process of reviewing applications. For example, the possibility of assigning a legal officer from Chambers to work together with VPRS at the initial review stage may be explored.

90. The Panel considers that checks with regard to the overall credibility of applications and proof of identity could be best carried out by the Registry exclusively. It is suggested that consideration be given to a database review of applications by Chambers. Chambers could review applications based on the relevant data entered in a centralised database by the Registry or reports generated from the database, rather than full application forms.

91. The Panel recognises that the current system whereby Chambers (and parties) review each application ensures that each individual is personally acknowledged and his/her story read by the Chambers and the parties, informing their understanding of a case and the impact of the crimes on victims. However, such a system may not be sustainable with large numbers of victims, which in some cases could reach many thousands. The Panel suggests that a modified system could be explored - with effective safeguards to ensure the rights of the accused and judicial oversight - that continues to allow Chambers to derive an understanding of the case and the impact of the crimes on the victims from the applications. For example, Chambers could further explore using the Registry's report on applications to base their decisions.

92. Going further, the use of sampling techniques could be explored, in consultation with relevant stakeholders, to see if it may enhance the efficiency of the process while also providing both the opportunity for victims to have meaningful participation and the necessary safeguards to the rights of the Defence. Sampling has been used successfully by decision-making bodies of claims mechanisms involving large numbers of victims, including the Commissioner Panels of the UN

Compensation Commission and the Property Claims Commission of the German Forced Labour Compensation Programme. Similarly, in some civil litigation cases involving large numbers of claimants, only a sample of the applicants' cases are selected by the parties to be reviewed in detail. In practice, such an approach could work with possible variations, as follows:

- i. Information from application forms would be entered into a centralised database by the Registry and assessed by the Registry based on guidelines from the Chamber;
- ii. The database would be accessible to the Chambers and all parties, subject to redactions;
- iii. At intervals, the Chamber would request the Registry to provide a selected number of applications which would be redacted and transmitted to the Chamber and parties for review (when grouping is undertaken, the sample would include applications from each of the groups/classes identified);
- iv. The Parties would provide their observations on the sample;
- v. The Chamber would review the sample, taking into account observations by the Parties on the sample applications and the assessment of the Registry;
- vi. In the event that concerns arose in relation to the applications, the Chamber could instruct the Registry to provide additional information to address these issues and verify that such issues do not also arise in other applications that are not part of the sample;
- vii. Absent any further concerns, the Chamber would decide on the sample applications and would then apply the same decisions to the remaining applications in the group from which the sample has been drawn.

#### ***Informing victims of decisions***

93. The Panel notes that it is unclear whether effective systems are currently in place to inform victims on the outcome of their applications in a timely manner. The Panel considers that there should be effective systems in place. Victims who are accepted to participate in ICC proceedings should be informed of that decision as well as the next steps, including informing them of their legal representative or the process for appointing one. If victims' applications are rejected they should also be informed promptly. It should be conveyed to victims that the decision only relates to their participation in ICC proceedings. While reliance on intermediaries may be necessary to pass on such messages, the Court should oversee the process of checking that the information is indeed transmitted and ensure that intermediaries have the resources to carry out this function. The Panel suggests that, when security assessments allow, a letter could be provided to victims both when an application is accepted and rejected.

## VIII. Assigning legal representation

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### Key recommendations:

- Ensure that victims' representatives are experienced or trained in working with victims and vulnerable persons;
- Maintain in the Registry a list of experts on victims and victim related issues who may assist legal representatives in their work, as well as the ICC, by bringing a broader perspective on victims to the attention of the Court;
- Ensure that victims have a direct say in the choice of their counsel and maintain continuity of legal counsel where possible;
- Give priority to external legal representation, especially where legal representatives have knowledge of the country and communities.

94. The Panel notes that the Rules of Procedure and Evidence state that victims are entitled to choose their counsel. Where there are a number of victims, the Chamber may request victims to appoint a common legal representative or order the Registry to choose one for them. In addition, the Panel takes note that both external counsel and counsel from OPCV can be appointed as common legal representatives.
95. The quality of the legal representation victims receive will be essential to their meaningful and effective participation in ICC proceedings. In addition to the minimum requirements set out in the ICC texts, the Panel encourages that victims' representatives also have a background or receive training in working with victims and vulnerable persons. In addition, experience and expertise in managing large groups of clients and group applications should be considered. Legal representatives' teams should include persons with a variety of relevant backgrounds and legal representatives should have the ability to hire persons with specific expertise as required for effective representation.
96. The Panel suggests that a list of experts on victims and victim related issues should be kept by the Registry who may assist legal representatives in their work, as well as the ICC, by bringing a broader perspective on victims to the attention of the Court. The Panel notes that experts play a particularly important role in ensuring that victims' views and needs are considered in the Inter-American system.
97. While acknowledging the challenges involved in consulting all victims on their choice of legal representative, the Panel strongly believes that victims ought to have a direct say in the choice of their counsel, in particular given the fact that victims have very few avenues to challenge the appointment of counsel by Chamber with assistance of the Registry. In addition, the Panel finds that, barring any breakdown in trust or relations between the victims and their legal representative, the continuity of legal representation should be seen as essential to maintain the relationship and trust that victims may have with their counsel.
98. The Panel also discussed some of the advantages and challenges of external versus legal representation for victims conducted by the OPCV. It concludes that external representation, especially where legal representatives have knowledge of the country and the communities, will have a significant advantage in representing victims over OPCV, even where OPCV has the

assistance of field staff. The Panel is also concerned about the capacity of OPCV to provide legal representation noting that staff work on more than one case at a time. As set out below, the Panel considered it was particularly important for the legal representative to be able to meet regularly in person and establish a relationship with their clients. However, the Panel strongly recognises the need for OPCV to provide essential support to newly appointed external counsel and recommends that further synergies be considered to enhance the representation of victims.

## IX. Consulting victims and taking instructions

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### Key recommendations:

- Support and fund regular in person consultations between legal representatives and clients, particularly in the build-up to key stages of proceedings;
- Ensure legal representatives have effective support on the ground to work and communicate with victims;
- Advocate continued communication between legal representatives and victims during periods of low judicial activity;
- Advocate that legal representatives develop strategies to identify, reach out to and consult all victims they represent, including women, people from marginalised groups and children;
- Communicate more detailed information to victims on what they should expect from their legal representative, the role of counsel and how they may complain, if they wish to do so;
- Develop guidelines for legal representatives on providing high quality representation for victims, in light of the complex nature of representing large groups of victims.

99. In practice, participation takes place mostly through the victims' legal representative. To ensure that the views expressed by counsel reflect victims' "views and concerns" and that legal representatives play more than a neutral "amici" role in the proceedings, regular in person consultations between legal representatives and their clients are essential, particularly in the build-up to key stages of the proceedings, both pre-trial and trial. While intermediaries may play a role in facilitating such contacts, the Panel considers that victims should have direct access to their legal representative and have means to contact him/her directly. Such an approach also re-enforces victims' legal representatives' direct accountability to their clients.

100. While direct meetings with counsel are required, the Panel considers that to ensure communication is maintained and that victims are able to reach out to their representative, victims' legal representatives should have effective support on the ground to work and communicate with victims, especially when they need to be in The Hague. Members of the legal representative's team can also play a role in coordinating with intermediaries.

101. The Panel notes that there will be times of low or no activity in the proceedings when there is little or no information to report to victims about a given case. The Panel also heard that the Court, counsel and intermediaries can be reluctant to organise meetings with victims at such times due to the lack of updates and the fear of 'disturbing victims for no reason'. While such concerns are understandable, the Panel believes that communication with victims during these stages is equally important, and a balance needs to be struck between these considerations. Victims should be aware of the reasons for low activity and the timelines of the proceedings so that they are not waiting for developments in vain. Such communication will further strengthen the trust and understanding between victims, their legal representatives and the Court, which will prove essential to fostering a meaningful and successful interaction at later stages of the proceedings.

102. Given the distance between victims and the ICC, victims should also be able to communicate with their legal representative on a regular basis, even in periods of low activity noted above. It is recommended that the frequency of meetings and updates be discussed and arranged from

the outset between the legal representative and victims. From experience, the Panel believes that at a minimum, legal representatives should meet or provide updates to their clients every four months to keep them informed of the status of the proceedings, prevent misinformation spreading, maintain engagement in the process and obtain an update on their needs, views and concerns. This would ensure regular contact and opportunity for questions and exchanges. In the event of sudden activity, it would ensure that victims are aware of the proceedings and able to feed in promptly. It also allows legal representatives to regularly test and maintain their communication systems with their clients.

103. Victims' legal representatives should from the start of representation design strategies to identify, reach out and consult all victims they represent, including women, people from marginalised groups and children.

104. The Panel notes that legal representatives are bound by the Code of Conduct for Counsel. However, under the current practice, it appears difficult for victims who may be dissatisfied with their counsel to question their conduct. While the Registry can receive complaints, there is no clear avenue or information for victims to make formal complaints. Furthermore, it appears that very limited information is communicated to victims in relation to the obligations owed to them by their counsel. The Panel submits that VPRS should communicate more detailed information to victims on what they should expect from their legal representative, the role of counsel and how they can complain, if they wish to do so. Complaint mechanisms should be easily accessible. This is particularly important considering the possibility that counsel be chosen by the Registry at the request of the Chamber or by the Chamber itself with limited consultations with victims.

105. The Panel notes that providing legal representation to large groups of victims is a complex process and that legal representatives should be provided with guidance on best practices. The Panel recommends the development of guidelines on providing high quality representation for victims, which legal representatives should seek to achieve. These guidelines could be developed by a working group within the Court, probably including VPRS and CSS, and maybe OPCV. The working group should draw on the expertise of practitioners/bar associations, some former legal representatives and NGOs with relevant experience. Compliance with the guidelines could be monitored ensuring that the independence of counsel is not compromised, including in reviewing drafts of work and travel plans and reports on their implementation, that legal representatives for victims have to submit for the purpose of legal aid.

## X. Keeping victims informed of proceedings

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### Recommendations:

- Undertake sufficient efforts to explain legal processes and issues that arise in judicial proceedings in a manner that is easily understood and accessible to victims;
- OTP should make a more systematic and comprehensive effort to communicate with victims during preliminary examinations, investigations and on key decisions it takes that determine the scope of its work, including the cases and charges it seeks to prosecute;
- Expand the dialogue between OTP and victims and affected communities, in advance of determining charges and issuing arrest warrants, explain the Office's choices and facilitate victims' understanding of its decisions;
- Consider *in situ* proceedings where the security situation allows;
- Develop specific strategies to reach survivors of sexual and gender-based violence and ensure they are able to follow judicial proceedings;
- Ensure legal representatives obtain the necessary resources to adequately consult with clients to provide necessary information on legal proceedings.

106. In order for victims to present their views and concerns, they need to be provided with information to understand the process generally in a format that is accessible. Victims must be informed in order to be engaged. While most victims will not have a legal background and may not want to be involved in all aspects of a situation or case, efforts should be taken to explain the legal process and issues that arise in an easy to understand manner so that victims have an opportunity to provide their views and concerns. Assumptions as to which issues victims will want to present their views and concerns should be avoided.

107. The Panel considers that, especially during the preliminary examination phase and the early stages of the proceedings, the OTP can play an important role in keeping victims informed about its work and the reasons for any decisions it takes. The Office is encouraged to make a more systematic and comprehensive effort at reaching out to victims during the preliminary examinations, expand its dialogue with victims and affected communities to listen to them before it issues arrest warrants and charges, explain the choices it has taken once an arrest warrant or summons has been issued and to facilitate victims' understanding of its decisions.

108. The Panel considers that it is important for victims to see the Court "in action" and ways should be found to achieve this. Coordinated communication between the various units interacting with victims and legal representatives should also be developed to ensure that participating victims are regularly informed of proceedings. When intermediaries play a role in keeping victims informed, adequate training should be provided about the ICC and its proceedings, including discussing with them the key messages to disseminate and how these will be translated into the victims' own language. It is crucial that victims' legal representative have a strong link with intermediaries who are interacting with their clients.

109. Where the security situation allows, *in situ* proceedings should be considered so that victims can directly witness the justice process, including their representative in the courtroom.

110. Specific strategies should be developed to reach women and to ensure that they are able to follow the proceedings. It should not be assumed that information communicated to community

leaders will be passed on to all members of the community. In some contexts, women may be excluded from this channel of communication and decision-making.

111. It is also important that information regarding the ICC's work to investigate and prosecute crimes of sexual and gender-based violence is communicated directly to those affected by these crimes and that there is some mechanism by which these victims' views and concerns can be sought separately ensuring that effective protection and support is provided to survivors of these crimes.
112. The Panel heard about the different ways updates are provided to victims throughout the proceedings, including through notes shared with intermediaries to summarise and explain developments, through phone calls or in person meetings between counsel and victims. The Panel encourages the consideration of alternative and creative forms of media for such updates. For example it is noted that theatre, comic book forms, bulk text messages and other materials have positively been used in other contexts to keep victims informed and may be appropriate media to convey certain information.
113. Strategies should be agreed upon between counsel and victims at the outset to ensure victims do not perceive lack of information as abandonment. Work plans should be developed by the victims' legal representative to ensure the flow of information with and within groups of victims. For example, when it may not be possible for all victims to meet regularly, systems could be set up whereby victims can nominate someone within a group or location for the purpose of receiving information updates on their behalf. Safeguards should be put in place to ensure that the representatives represent and communicate with all victims, including women, people from marginalised groups and children.
114. Legal aid for victims is different from legal aid to the defence in that legal representatives represent large number of victims, sometimes spread over large distances. Ensuring consultation and communication will thus require different levels of resources than those available when counsel only represents one person who is present in The Hague. This distinction is currently not recognised in the legal aid system for legal representatives of victims. In the absence of dedicated resources for consulting with clients (including travel), these resources are currently taken from an 'investigations' budget. The Panel recommends that CSS should work in close consultation with the VPRS in order to ensure that legal representatives obtain the legal aid resources necessary to ensure adequate consultation and information to victims while managing the funds efficiently. The Panel suggests that further consideration be given to having staff from VPRS managing or assisting CSS in the management of legal aid for victims.



## Annex 1: Biographies of experts

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**Dr. Inger Agger**, Licensed Psychologist, Senior Expert & NIAS Associate, Nordic Institute of Asian Studies, Copenhagen. Dr. Agger's research has focused primarily on the development of psychosocial interventions for survivors of war, torture and politically or gender-related human rights violations. From 2006 to 2010 she worked in Asia (mainly in India, Sri Lanka, Cambodia, and the Philippines), in a number of action research projects with local human rights and mental health organisations in cooperation with Dignity – Danish Institute Against Torture (formerly Rehabilitation and Research Centre for Torture Victims – RCT). The main objective of these projects has been to develop culturally relevant psycho-legal, ceremonial or spiritual healing approaches for survivors of human rights violations on basis of the "testimonial therapy method". From 2010, Dr. Agger has worked in Cambodia with a research project on local approaches to healing of trauma. Dr. Agger has also served as an associate research professor at the University of Copenhagen and has published widely in the field of "mental health and human rights" including two books (in English and Spanish): *The Blue Room: Trauma and Testimony Among Refugee Women – A Psychosocial Exploration* (London: Zed Books, 1994), and *Trauma and Healing Under State Terrorism* (with S.B. Jensen, London: Zed Books, 1996). She has recently produced a documentary film on basis of her research project in Cambodia: *Justice and Healing in Cambodia* (with S. Rordam, Copenhagen: Dignity, 2012).

**Mr. Sylvestre Bisimwa**, Lawyer and Human Rights Educator and Trainer, Bukavu, Democratic Republic of Congo (DRC). Mr. Bisimwa supervises a team of six lawyers in the organisation Action for Rights Education (AED) in Bukavu which provides access to justice for the disadvantaged. AED currently focuses its assistance to women who have been victims of sexual violence and torture victims. The organisation also works with a team of social workers who are responsible for awareness programs as well as victims' counselling and orientation. He has acted as a legal representative for victims in DRC situation before the ICC, in addition to serving as a legal counsel with numerous national and international organisations in the DRC.

**Mr. Terith Chy**, Executive Officer, Documentation Centre of Cambodia (DC-Cam). Mr. Chy is Team Leader of the DC-Cam Victim Participation Project. Since the project's inception in early 2008, Mr. Chy has met with thousands of survivors of the Democratic Kampuchea regime across Cambodia to update the concerned on developments at the Extraordinary Chambers in the Courts of Cambodia (ECCC) and to inform them of their right to participate in the proceedings. In 2009, he co-authored a book chapter on victim participation before the ECCC. He holds an LL.M. in Human Rights from the University of Hong Kong and a Master of Arts in Criminology from the University of Hull, United Kingdom.

**Ms. Katherine Gallagher**, Senior Staff Attorney at the Center for Constitutional Rights (CCR). At the CCR, Ms. Gallagher's work focuses on holding individuals, including US and foreign government officials, and corporations, including private military contractors, accountable for serious human rights violations. Among the cases she has worked, or is working, on are international accountability efforts for U.S. officials involved in torture. Prior to joining CCR, Ms. Gallagher worked at the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY) from 2001-2006. She has also worked as a legal advisor for the Organization for Security and Cooperation in Europe (OSCE) in Kosovo and with the Special Court for Sierra Leone in Freetown. During the negotiations to establish the ICC, she worked as a member of the Women's Caucus for Gender Justice, to ensure that gender-based violence and discrimination were adequately addressed. Her recent publications include, "Achieving Corporate Accountability for Egregious International Law Violations through the Alien Tort Statute: A Response to Professor Branson," 9 Santa Clara J. Int'l L. 261 (2011); "Civil Litigation and Transnational Business: An Alien Tort Statute Primer," July 2010 and "Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-level United States Officials Accountable for Torture," November 2009, both in the *Journal of International Criminal Justice*. She has been a Vice-President on the International Board of the International Federation for Human Rights since 2010.

**Dr. Marjorie Jobson**, National Director of the South African Khulumani Support Group and Commissioner on the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. The Khulumani Support Group was formed in 1995 by survivors and families of victims of the political conflict of South Africa's apartheid past and now has around 85,000 members. The Group has developed considerable expertise in ways of reaching and supporting survivors of apartheid-era violations towards building their advocacy skills and supporting their efforts to become self-reliant. Dr Jobson is a medical

doctor with a specialisation in anaesthesiology. She currently serves on the Advisory Board of the Institute for Women's and Gender Studies at the University of Pretoria. She is a Board Member of the Siyavuna Abalimi Development Centre that has developed a social franchise model for smallholder organic vegetable producers linked to farmer associations and marketing cooperatives. Dr. Jobson is also a Trustee of the Makana Mining Trust, a community trust working to empower residents of Makana Municipality to benefit local kaolin resources for economic development.

**Ms. Sapna Malik**, Partner at Leigh Day, London. Ms. Malik has over 14 years' litigation experience, specialising in international and group claims. She currently heads a team of lawyers representing over 300 Iraqi citizens who claim that they were subjected to unlawful detention and treatment by British forces in Iraq. Two former successes include securing compensation for over 1,000 Kenyan pastoralists who successfully sued the British Ministry of Defence for injuries and deaths allegedly caused by unexploded ordnance left on their grazing range by the British Army since the Second World War, and representing over 200 British Military veterans exposed to chemical warfare agents, allegedly without their informed consent, at the Porton Down military laboratories from the 1940s-1980s.

**Dr. Carlos Martín Beristain**, Professor of Psycho-Social Health of the European Masters Program in International Humanitarian Aid, Universidad de Deusto, Spain. Dr. Martín Beristain is a medical doctor who holds a Ph.D. in Health Psychology. Since 1989 he has worked in Latin American countries that have suffered conflicts such as El Salvador, Guatemala, Peru, Colombia and Mexico and presently provides psychosocial support to victims, human rights organisations and affected communities. Dr. Martín Beristain served as Coordinator of the Recovery of Historical Memory Report (REMHI, one of Guatemala's truth commissions) and as psychosocial expert for cases of massacres, disappearances and torture for the Inter-American Human Rights Court and the International Criminal Court. He also served as an advisor to truth commissions in Peru, Paraguay and Ecuador. Dr. Martín Beristain's publications include *Acompañar los procesos con las víctimas* (2012), *Contribution of Truth, Justice and Reparation Policies to Latin American Democracies* (2011, editor), *Manual de una perspectiva psicossocial en la investigación en derechos humanos* (2010), *Humanitarian Aid Work: A Critical Approach* (2008), *Diálogos sobre la Reparación. Experiencias en el sistema Interamericano* (2008) and *Reconstruir el tejido social* (1999).

**Mr. Richard Stein**, Partner at Leigh Day, London. Mr. Stein's practice covers judicial review and human rights. He has over 15 years experience of bringing challenges for NGOs and individuals to decisions and conduct of UK public authorities in a range of areas including the cases of Binyam Mohamed (UK complicity in torture) Serdar Mohammed (UK transfer of detainees to Afghan authorities) al Saadi & Belhadj (UK complicity in rendition to Libya) as well as a range of other cases of a more general political/human rights nature and those dealing with health and social care, education and planning/environment issues.

**Dr. Norbert Wühler**, Member of Kosovo Property Claims Commission (KPCC). Dr. Wühler is formerly Director of the Reparation Programs at the International Organization for Migration (IOM), Chief of the Legal Service at the UN Compensation Commission, Legal Assistant of the President and Deputy Secretary-General at the Iran-United States Claims Tribunal and Attorney-at-law. Dr. Wühler's areas of expertise are international law, international claims and reparations and international commercial arbitration. His publications include *Property, Restitution and Compensation: Practices and Experiences of Claims Programmes* (with Heike Niebergall), 2009; *Implementation of an Agreed Solution for Palestinian Refugee Claims: Learning from the Experience of Other Claims Mechanisms* (with H. Niebergall) in: R. Brynen / R. El-Rifai (eds.), *Compensation to Palestinian Refugees and the search for Palestinian-Israeli Peace* (2013), page 177; *Procedural Aspects of Claims Mechanisms* (with E. Kristjánsdóttir), *Paper for the ILA Committee on Reparation for Victims of Armed Conflict* (August 2011); *Claims for Restitution and Compensation*, in: R. Cholewinski / R. Perruchoud / E. MacDonald (eds.), *International Migration Law: Developing Paradigms and Key Challenges* (2007), page 203; *The United Nations Compensation Commission*, in: A. Randelzhofer / C. Tomuschat (eds.), *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (1999), page 213.

## Annex 2: List of topics identified for discussion

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- I. **What should participation in international criminal proceedings offer victims?**
  1. What should be the underlying goals of victims' participation in proceedings?
  2. What benefits can achieving these goals provide to victims?
  3. Can these goals and objectives be achieved by the ICC?
- II. **What can victims contribute to international criminal proceedings and the Rome Statute System?**
  1. What value can victims' participation provide to different stages of legal proceedings?
  2. Does the perception that the ICC gives effect to victims' rights strengthen the institution and its role in the fight against impunity? Does it present any risks?
  3. Can victim participation in ICC proceedings contribute to complementarity efforts towards ending impunity by empowering victims and affected communities?
- III. **What can be done to ensure that all victims are informed of and understand their right to participate in ICC proceedings and that they are able to apply?**
  - A. ***Information and outreach to victims***
    1. What can be done to inform all victims of their right to participate, especially women and members of other marginalised groups?
    2. What key messages could be developed to manage expectations of victims at this initial stage? How should they be presented?
    3. What could be the most effective roles for the different units/organs of the ICC, including outreach and the OTP, as well as for legal representatives and local civil society?
  - B. ***The application process***
    1. How important is a formal application requirement/process for victims and their effective participation in proceedings?
    2. What can the ICC do to ensure that the application process is accessible and beneficial to victims as well as supporting their participation in the proceedings?
    3. How can large numbers of applications be processed effectively while satisfying the need for certainty and respecting for the rights of the defence? Can collective applications and grouping victims provide solutions?
    4. How can victims be kept informed of the status of their application?
- IV. **What can be done to ensure that victims are able to participate effectively in the process?**
  - A. ***Keeping victims who are participating informed of the proceedings***
    1. What information about the proceedings should the ICC seek to communicate to victims?
    2. How can updates about the proceedings be communicated most effectively?
    3. What could be the most effective roles for victim representatives, the ICC outreach unit, OTP and intermediaries?
  - B. ***Presenting victims' views and concerns at appropriate stages***
    1. What matters most for victims in terms of what they wish to communicate in proceedings, and at what stage? How do these relate to concerns about the rights of the accused?
    2. How should victims' views and concerns be collected and presented? In particular, how can legal representatives most effectively take instructions from their clients and represent their diverse views and concerns, especially when they represent large numbers of victims?
    3. How can large numbers of victims present their views and concerns without many voices, including women and other marginalised groups, being drowned out?
    4. Are there specific instances where direct/in person participation of victims should be considered?
    5. Should the ICC seek to communicate victims' stories, views and concerns to affected communities through outreach and reflect them in the public records, taking into account privacy and protection considerations?
  - C. ***Safety, physical & psychological well-being, dignity & privacy of participating victims***
    1. Beyond measures already adopted by the ICC, is there anything the ICC should do to further the protection of victims participating in proceedings?

### Annex 3: Documents reviewed by the Panel

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In advance its meeting, the Secretariat reviewed the following documents as well as background papers prepared by its Secretariat:

1. International Criminal Court: *Report of the Court on the Revised strategy in relation to victims: Past, present and future*

Link: [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP11/ICC-ASP-11-40-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-40-ENG.pdf)

2. International Criminal Court: *Report of the Court on the review of the system for victims to apply in proceedings*

[http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP11/ICC-ASP-11-22-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-22-ENG.pdf)

3. Assembly of States Parties, *Report of the Bureau on Victims and affected communities and the Trust Fund for Victims and Reparations*

[http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP11/ICC-ASP-11-32-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-32-ENG.pdf)

4. Judge Van den Wyngaert, *Victims before International Criminal Court: Some views and concerns of an ICC trial judge*

[http://law.case.edu/journals/JIL/Documents/%2822%29%20Van%20den%20Wyngaert\\_Darby.pdf](http://law.case.edu/journals/JIL/Documents/%2822%29%20Van%20den%20Wyngaert_Darby.pdf)

5. Redress, *The Participation of Victims in International Criminal Court Proceedings: A review of the practice and consideration of options for the future*

[http://www.redress.org/downloads/publications/121030participation\\_report.pdf](http://www.redress.org/downloads/publications/121030participation_report.pdf)



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